Supreme Court, U S
FILED
DEC 2 1 2010
OFFICE OF THE CLERK

No. 10-99

In The
SUPREME COURT OF THE UNITED STATES

FRANCISCO JAVIER RIVERA AGREDANO and
ALFONSO CALDERON LEON,
Petitioners,
v
UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI to the U.S. Court of Appeals for the Federal Circuit

---

REPLY BRIEF

TERESA TRUCCHI SBN# 135543
SUPPA, TRUCCHI, AND HENEIN, LLP
3055 India Street, San Diego, CA 92103
Telephone: (619) 297-7330; Telefax . (619) 297-9658
email: ttrucchi@san.rr com
Attorneys for Petitioners
FRANCISCO JAVIER RIVERA AGREDANO and
ALFONSO CALDERON LEON

TABLE OF CONTENTS

INTRODUCTION 1

PRE-SALE SEARCH IS NOT A REGULATORY FUNCTION BUT CONDUCTED FOR THE EXPRESS PURPOSE OF THE COMMERCIAL TRANSACTION AND, AS SUCH, PUBLISHED DECISION SETS MISLEADING PRECEDENT ON THIS ISSUE 1

"CLEARLY ERRONEOUS" STANDARD ALSO NOT ADDRESSED 5

EMOTIONAL DISTRESS 10

THIRD PARTY BENEFICIARY CLAIM 11

DISPARATE TREATMENT 12

ARGUMENT IN OPPOSITION TO TRANSFER TO 9TH CIRCUIT WITHOUT LEGAL PRECEDENT 13

INACCURATE FACTUAL CHARACTERIZATIONS 15

CONCLUSION 18

TABLE OF AUTHORITIES

ABF Capital Corp v Osley, 414 F 3d 1061 (9th Cir. 2005)	14
Anderson v United States 344 F.3d 1343 (Fed. Cir. 2003)	2, 7
Baltimore & Ohio R R 261 U.S. 592 (1923)	7
Beagle v Vasold (1966) 65 Cal 2d 16	11
Cervantes v United States 330 F 3d 1186 9th Cir 2003)	13
Cienega Gardens v United States, 194 F 3d. 1231 (Fed Cir. 1998), cert denied, 528 U S 820 (1999)	8-9
Garfoot v Avila (1989) 213 Cal.App 3d 1205	11
Precision Pine v USA (2010) 596 F3d 817 (Fed Cir 2010)	4
Rivera Agredano v USA, 82 Fed Cl. 416 (2008)	6, 7
Rivera Agredano v USA 70 Fed Cl 564 (2006)	7
Rodriguez v USA 69 Fed Cl. 487 (2006)	7, 12
28 U S C Section 1631	14
Federal Rule of Civil Procedure 54	14, 17
7 Wigmore, Evidence (3d ed 1940) Section 1944	11
McCormick on Damages, Section 88, pp 318-319	11

INTRODUCTION

The arguments set forth in the BRIEF FOR THE UNITED STATES IN OPPOSITION rely upon inaccurate presumptions, incorrect factual descriptions and fail to accurately identify or specifically address the majority of the issues as raised by the petitioners in the petition for certiorari.

PRE-SALE SEARCH IS NOT A REGULATORY FUNCTION BUT CONDUCTED FOR THE EXPRESS PURPOSE OF THE COMMERCIAL TRANSACTION AND, AS SUCH, THE PUBLISHED DECISION SETS MISLEADING PRECEDENT ON THIS ISSUE

The lack of a substantive opposition by the United States to the issues as presented in the petition for certiorari is particularly apparent in the ongoing refusal of the United States to directly acknowledge or address the fact that the search at issue in this complaint was a component of the sale transaction and that the pre-sale directives published by the United States [Appendix, page 63] constituted an "objective

manifestation" by the United States of the respondent's understanding of this mutually anticipated sale component [Anderson v United States 344 F.3d 1343, 1353 (Fed. Cir. 2003)]. The undisputed facts found by the Trial Court establish that the post forfeiture search was not a component of the United States regulatory functions (which were performed several months earlier at the time of the seizure) but part of the commercial transaction:

"Defendant's conduct that showed its 'tacit understanding' of this warranty was repeatedly demonstrated by defendant's written policies, by the testimony provided by defendant's agents and by the fact that the circumstances of the sale suggested absolutely no uncertainty on the part of the government that the Pathfinder was free of contraband " [Appendix at pages 71-72]

As is the case in all earlier pleadings filed by the United States in this case, in the opposition brief to this petition, the United States continues to fail to identify the regulation underlying the purported "regulatory activity" that compelled the United States to enter into a sales transaction with the petitioner FRANCISCO JAVIER AGREDANO RIVERA for the sale of this vehicle This is because there is

no such regulation To avoid having to address this issue, the United States glosses over this distinction by not acknowledging or addressing the fact that the pre-sale searches were expressly (per the express language of the United States' own directives) for the purpose of the sale transaction.

The search at issue was not a component of the seizure and forfeiture of the vehicle occurring several months earlier and prior to forfeiture The undisputed fact is that by the time that the pre-sale search should have, but didn't, occur, the vehicle was owned by the United States. The United States, as owner, could keep it, salvage it, sell it. The United States elected to enter into a commercial transaction and decided to sell the vehicle. The "regulatory" obligation to search the vehicle was not at issue at the time of the commercial transaction at issue in this case

The fact that there is a critical distinction between the initial regulatory search for the purposes of seizing the vehicle and the post forfeiture, pre-sale search was clearly raised in the petition for certiorari By choosing only to address the "regulatory function" search (the search at the time of the initial seizure in January of 2001), the United

States completely failed to address, in any fashion, the search actually at issue in this case – the pre-sale, post forfeiture search that should have been conducted for the sales transaction in September of 2001 per the United States' own written policies. The petition raised the point that the failure to acknowledge this distinction was one of the main perceived problems with the published decision issued by the Court of Appeal. The United States should have addressed this issue directly as this distinction is critical to the argument that the published ruling of the Court of Appeal in this case is a misleading precedent.

As the published Court of Appeal holding in this case is already being relied upon for the proposition that the "a contracting party cannot rely on (regulatory) violations to establish a contractual violation to a party to whom the statutory duties were not owed" [Precision Pine v USA (2010) 596 F3d 817 at page 830 (Fed.Cir 2010)] and this holding has little to do with the facts or circumstances involved in the Agredano v USA case, the published opinion of the Court of Appeals in this case sets an inaccurate and misleading precedent and should be overturned.

"CLEARLY ERRONEOUS" STANDARD ALSO NOT ADDRESSED

As with the critical factual distinction between the regulatory seizure search in January of 2001 and the post forfeiture commercial transaction search which should have occurred several months later (in connection with the sales transaction in September of 2001), in the opposition the United States also does not directly address the fact that the factual findings of the Trial Court (that the facts supporting the implied warranty at issue in this case) must be found to be "clearly erroneous" before they can be overturned on appeal The Trial Court's conclusion of the existence of a implied in fact warranty, despite the disclaimers published in the sale flyer and brochure, is clearly based upon a factual assessment To overturn, the Court of Appeal was required to find that the Trial Court's factual findings were "clearly erroneous" yet failed to do so In fact, the argument that the Trial Court's factual findings were "clearly erroneous" was not even raised by the United States in the Court of Appeal The phrase "clearly erroneous" does not even appear one time in the opposition to this petition despite the significant emphasis on this issue in the petition for certiorari.

The published ruling of the Court of Appeal sets a new legal precedent as it opens the door to the rejection of detailed factual findings by a Trial Court without a determination that the factual findings were "clearly erroneous". The United States claims in the opposition at page 6 that the Court of Appeal overturned the Trial Court *"(W)ithout disturbing any of the predicate facts found by the trial court ."* However, to overturn the Trial Court on the issue of the implied warranty the Court of Appeal necessarily "disturbed" the following factual findings of the Trial Court.

". . the 'as is' clause in the contract does not preclude the existence of a possible implied-in-fact warranty in this case because the "as is" clause does not cover a situation in which the defendant sells the Pathfinder with concealed contraband to plaintiff." [Rivera Agredano v USA, 82 Fed Cl 416, 435 (2008)] . the plain meaning of the 'as-is' clause limits its scope to the construction, maintenance, and mechanical operation of the vehicle and does not cover a situation in which 'the vehicle had been modified in a way that had no effect on its ability to function for transportation' by 'introduc[ing] an attribute not ordinarily associated with [the vehicle's ability to function for transportation].'"

[Rivera Agredano v USA, 82 Fed Cl 416, 435 (2008) citing Rivera Agredano v USA 70 Fed Cl 564 at 572 (2006) citing Rodriguez v USA 69 Fed Cl. 487, 498 (2006)]

"The scope of the "as is" provision is "**founded upon a meeting of minds**, which, although not embodied in an express contract, **is inferred, as a fact**, from **conduct of the parties** showing, **in the light of the surrounding circumstances**, their tacit understanding." [Rivera-Agredano v USA, 82 Fed Cl. 416, 440 (2008)(emphasis added); citing, Baltimore & Ohio R R 261 U S. 592 at 597 (1923)]

These holdings were clearly factual conclusions by Judge Hewitt which she felt supported the legal conclusion that the disclaimers printed by the United States and posted/distributed at the sale did not preclude the finding of an implied warranty in this case.

The United States argues in the opposition that the Court of Appeal did not reject judge Hewitt's factual findings but merely looked at the "As-Is" disclaimer in a factual vacuum and determined that, when all of the underlying facts are disregarded, the finding of any implied warranty was "incongruous" with the disclaimers in a sale

flyer and brochure stating that the vehicle was purchased "As Is". This holding simply disregards the fact that the Trial Court found that, **under the facts of this case**, the "As Is" provision did NOT apply to attributes added to the vehicle and not typically considered part of a motor vehicle (such as the over 37 pounds of marijuana that the Trial Court found was not an attribute of a typical Nissan Pathfinder's wheel wells and door panels) The Trial Court's conclusion was supported by the factual finding arising from, in part, the United States own written directives [Appendix at pages 71-72] requiring the removal of this atypical attribute (concealed marijuana) before the vehicle was sold in a post-forfeiture, purely commercial, sales transaction These factual findings would necessarily have to be "disturbed" in order to overturn the Trial Court's ruling on the issue of the implied warranty.

The United States cites to the case of Cienega Gardens v United States, 194 F 3d. 1231, 1239 (Fed Cir 1998), cert denied, 528 U S 820 (1999) claiming that the case supports a *de novo* review of the facts in this case by the Court of Appeal [Opposition at page 5] This is an inaccurate description of the holding in Cienega, Id., In Cienega, Id , the Court found that. "Whether a contract exists is a mixed question of law and fact [citations omitted].

Since the parties do not dispute the relevant facts, the privity issue reduced to a question of law, which we review *de novo* " [Cienega, Id at 1234]

The Cienega, Id case at 1234 found on a motion for summary judgment that no privity existed between the parties. In contrast, there is no issue of privity in this case as to the implied warranty cause of action As such, the Cienega, Id , case does not stand for the proposition that the Court of Appeal could conduct a *de novo* review of the facts in this case The standard to overturn a Trial Court's factual findings should remain "clearly erroneous" and the fact that the United States cited to Cienega, Id , is even more support for the assertion that the published ruling of the Court of Appeals in this case is contrary to well established precedent (i e , that a trial court's factual findings must be "clearly erroneous" to be overturned on appeal) and misleading

The holding in the published opinion in the instant case establishes a new legal precedent that is contrary to the long held policy that the Trial Court has a superior vantage point to evaluate facts As such, the Court of Appeal's published opinion on this issue should be reviewed as it is inconsistent with the rulings of other Courts of Appeal

EMOTIONAL DISTRESS

The United States does not contest in the opposition the petitioners' argument that this case presents the type of factual situation that warrants an award of emotional distress under the implied warranty theory The United States argues in the opposition that there was inadequate evidence of emotional distress damages to warrant an award for emotional distress [Opposition at page 8]. The Trial Court discussed the extensive evidence of emotional distress introduced at the trial [Appendix at pages 93-98] and ultimately found that the evidence lacking at the time of trial was evidence of specific monetary amount for emotional distress. [Appendix at pages 100-101] However, the established precedent is clear that evidence of a specific monetary amount for an award of emotional distress damages is not required

"Pain and suffering, by definition, is an abstract concept. It is not readily calculable through a convenient mathematical formula, **evidence of its precise monetary equivalent cannot be definitively presented** as if it was past medical expenses or wages lost due to an injury Indeed, the jury is only instructed to award a "reasonable"

amount, that a definite standard or method of calculation does not exist, **and argument urging a particular calculation or amount must not be considered evidence**." [Garfoot v Avila (1989) 213 Cal App 3d 1205, 1212 (emphasis added); Beagle v Vasold (1966) 65 Cal 2d 166, 181 citing, 7 Wigmore, Evidence (3d ed 1940) Section 1944, pp 55-56, McCormick on Damages, Section 88, pp. 318-319]

The Trial Court's published decision is clearly inconsistent and in conflict with the decisions of the other Court of Appeals that have considered this issue and the CA Supreme Court ruling in Beagle v Vasold (1966) 65 Cal 2d 166, 181 This published holding by the Trial Court sets an inaccurate precedent (i e., that evidence of a specific monetary amount is required before emotional distress damages may be awarded) and should be overturned.

THIRD PARTY BENEFICIARY CLAIM

The United States does not address the third party beneficiary claim of ALFONSO CALDERON LEON except in a passing reference in connection with the argument against a finding of an implied warranty However, the

published decision of the Trial Court [both in the instant case and the similar case of Rodriguez v USA; 69 Fed. Cl. 487 (2006)] sets an inaccurate precedent as well. It is not logical to contend that ALFONSO CALDERON LEON, as a passenger in a drug laden vehicle, was not within the scope of anticipated victims should the drugs be discovered by law enforcement The precedents set by the holdings in the instant case and the similar case of Rodriguez v USA, 69 Fed. Cl. 487 (2006) would allow a party involved in the sale of a vehicle to avoid liability to everyone except the direct purchaser should the vehicle have a defect (in this case, concealed marijuana) making the vehicle unsafe for all occupants (not just the driver) This is another precedent arising from the published decisions in this case which should be reviewed as it is misleading and an inaccurate recitation of established law

DISPARATE TREATMENT

The illogical and inconsistent results that will occur should the inconsistent ruling and holdings referenced above be allowed to stand is most dramatically illustrated by comparing this case to the case of Jose Cervantes The United States also failed to directly address this issue (except

in a passing reference in a footnote on page 10 of the opposition) The decision rendered by the United States Court of Appeals for the Federal Circuit has the potential to unfairly and adversely impact many members of the general public. The ruling furthermore will have an unreasonably disparate impact on individuals (including US citizens) who purchase a vehicle from the USA and then drive over the border into Mexico before being wrongfully arrested for large loads of marijuana left in the vehicle by the USA at the time of the sale In the case of Jose Cervantes, Mr Cervantes (also a citizen of Mexico) suffered this exact same harm and was allowed to prevail solely because his arrest occurred in San Ysdiro, CA and not in Mexico [see, Cervantes v United States 330 F 3d 1186 (9th Cir 2003)]. There is no logical basis to establish a precedent based on the sole distinction of where one happens to be arrested.

ARGUMENT IN OPPOSITION TO TRANSFER TO 9TH CIRCUIT WITHOUT LEGAL PRECEDENT

The United States offers no authority for the argument made on page 8-9 of the opposition that Judgment on the tort causes of action automatically entered "150 days from entry on the civil docket" of the ruling on the United

States' motion for summary judgment by the Southern District of California despite the fact that the same case was still pending, against the exact same defendant, on the contractual causes of action and without an order for entry of judgment under Federal Rule of Civil Procedure Rule 54.

The United States cites the case of ABF Capital Corp v Osley, 414 F 3d 1061, 1064 (9th Cir 2005) in support of this argument but this case does not stand for the proposition that more than one judgment can be entered against the same defendant on the same set of facts The issues related to the dismissal of the FTCA cause of action should be transferred to the Ninth Circuit Court of Appeals for determination. The FTCA issues were dismissed as a result of the ruling on the motion for summary judgment by the Southern District of California, were not waived and have not yet been conclusively determined in this action No final judgment from which an appeal could be taken was entered as a result of the dismissal of the tort causes of action in the motion for summary judgment until the instant appeal was filed (at which time the issue of the summary dismissal of the FTCA causes of action was properly raised). [28 U S.C. Section 1631] As the Court of Appeal for the Federal Circuit lacked jurisdiction due to the Tucker Act to consider this properly

raised issue on appeal, a transfer to the Ninth Circuit Court of Appeal is proper and the only equitable manner in which to ensure that the petitioners' rights in this case are fully and fairly considered

INACCURATE FACTUAL CHARACTERIZATIONS

The United States' description of some of the underlying facts is misleading in some critical respects:

1 Knowledge of the existence of the concealed marijuana: On page two of the opposition, the United States contends as follows: "*Unbeknownst to either party, the vehicle contained a significant amount of concealed marijuana*." This contention is repeated on page 10. While it is accurate to say that the petitioner was unaware of the concealed marijuana, the United States clearly should have known of the strong probability that the vehicle still contained marijuana (1) a large amount of marijuana was discovered in the gas tank during the seizure search in January of 2001 [Appendix at page 48-51], (2) the United States was aware that if narcotics were concealed in one part of the vehicle, there was a strong probability that narcotics were concealed in other parts of the vehicle as well

[Appendix at page 51 referencing redacted portion of the testimony of Mr. Marilao at transcript 421:20-21] (3) the back seat and doors of the vehicle at issue in this case had obviously never been searched as these areas were in a pristine condition at the time of the sale in September of 2001 [as shown in the photographs obtained from the United States pursuant to petitioners' Freedom of Information Act request; Appendix at page 84-86].

One contracting party, the United States, had superior knowledge of this risk (a risk that would tend to lower the selling price of the merchandise if known to the purchaser) but did not disclose this heightened risk to the other contracting party and also failed to perform the acts that the United States knew were mutually presumed to be a part of the commercial transaction -- a pre-sale search (an implied contractual term objectively manifested in the United States' written pre-sale directives) putting all future occupants of the vehicle (not just the owner/driver) at risk. Therefore, to the extent that the United States is attempting to infer that both contracting parties were equally ignorant of the risk presented by the concealed marijuana, this inference is not supported by the facts as found by Judge Hewitt

2 Contention that motion for summary judgment ruling was not appealed and the tort causes of action dismissed without prejudice is inaccurate

The petitioners did appeal the ruling on the motion for summary judgment but dismissed the same in light of the fact that the United States demanded a dismissal due to a lack of a final judgment by virtue of the transfer of the case to the Court of Federal Claims. In direct contradiction to the argument presented at the time of the dismissal of the appeal, the United States now attempts to convince this Court that a final judgment on the tort causes of action entered automatically "150 days from entry on the civil docket" of the ruling on the United States' motion for summary judgment by the Southern District of California

The only final judgment ever issued in this case involving the United States (judgment was entered in favor of EG&G under Rule 54 in 2004), and from which an appeal was possible, was the judgment issued by the Court of Federal Claims in 2008 The dismissal of the tort claims was raised in the appeal to the Court of Appeals and again in the pending Petition for Certiorari The "splintering" of this case is the result of the Tucker Act and should not result in the

petitioners' loss of a right to pursue an appeal of the dismissal of the torts causes of action on the motion for summary judgment heard in the Southern District of California prior to the transfer of the case to the Court of Federal Claims under the Tucker Act

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

12-21-10 Respectfully submitted,

Teresa Trucchi
SUPPA, TRUCCHI AND HENEIN LLP
3055 India Street
San Diego, CA 92103
(619) 297-7330